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No. 91-1938

In the Supreme Court of the United States

OCTOBER TERM, 1992

YELLOW FREIGHT SYSTEM, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

WILLIAM KANTER
ROBERT M. LOEB
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the district court had jurisdiction under the All Writs Act, 28 U.S.C. 1651, to enforce the consent decree entered in this case, and the court-ordered Election Rules entered pursuant to that decree, against actions by third parties that threatened the decree.

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OPINIONS BELOW

The court of appeals' opinion (Pet. App. A1-A35) is reported at 948 F.2d 98. The district court's opinion (Pet. App. A36-A45) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1992. On February 26, 1992, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including May 29, 1992 (Pet. App. A103), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In June 1988, the United States filed a civil action under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, against the International Brotherhood of Teamsters (IBT) and members of the IBT General Executive Board. The complaint alleged that the IBT had long been under the control of organized crime and sought equitable relief to rid the union of such control. See Pet. App. A5; *United States* v. *IBT*, 905 F.2d 610, 612-613 (2d Cir. 1990). In March 1989, the parties agreed to settle the action and stipulated to the entry of a consent decree incorporating the terms of their settlement agreement. Pet. App. A5.

The principal goal of the settlement and the consent decree is to wrest the union from the influence of organized crime and to establish a new system of rank-and-file elections. Pet. App. A5-A6; *United States* v. *IBT*, 931 F.2d 177, 180-181 (2d Cir. 1991). Pursuant to the consent decree, the district court appointed three officers: an Independent Administrator to oversee the decree's remedial provisions; an Investigations Officer to investigate and prosecute disciplinary charges against corrupt IBT members; and an Election Officer to oversee and certify the election process. Pet. App. A5-A6, A69-A71; *United States* v. *IBT*, 941 F.2d 1292, 1294 (2d Cir. 1991), cert. denied, 112 S. Ct. 1161 (1992); *United States* v. *IBT*, 905 F.2d at 613.

The consent decree empowered the Election Officer to "supervise" the 1991 IBT election process. Pet. App. A76-A77. The district court that entered the decree determined that the Election Officer's supervisory powers include the "right to promulgate electoral rules and procedures." *United States* v. *IBT*, 723 F. Supp. 203, 207 (S.D.N.Y.), appeal dismissed, No. 89-6252 (2d Cir. 1989), 496 U.S. 925 (1990). Pursuant to that authority,

the Election Officer proposed a set of Election Rules to govern the 1991 election and submitted the Rules to the district court for approval. The district court modified the Rules and adopted them as an order of the court, declaring the Elections Rules to be the "linchpin" to the enforcement of the consent decree. *United States* v. *IBT*, 742 F. Supp. 94, 97 (S.D.N.Y. 1990), aff'd, 931 F.2d 177 (2d Cir. 1991); see also Pet. App. A49. The district court held that the court-adopted Election Rules "shall be enforceable upon pain of contempt." *United States* v. *IBT*, 742 F. Supp. at 108.

The Election Rules protect the rights of IBT members to participate in union election campaign activities. Pet. App. A104-A105. The Rules specifically state that "[n]o restrictions shall be placed upon candidates' or members' pre-existing rights to solicit support [or] distribute leaflets or literature * * * on employer or Union premises." Pet. App. A105.[1]

2. During the 1991 IBT election campaign, petitioner Yellow Freight Systems, Inc., barred several IBT candidates who were not Yellow Freight employees from entering its facilities in Chicago Ridge, Illinois, and Detroit, Michigan, to campaign for union office. Pet. App. A7. The excluded candidates filed protests with the

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[1] The Election Rules also set out a process for expeditiously raising and adjudicating election protests. Pet. App. A105-A112. Under that process, protests concerning the election and any alleged improper or inequitable treatment of a candidate or his/her supporters must be filed with the Election Officer, and the Election Officer then determines the merits of the protest and the appropriate remedy. Pet. App. A105-A108. Any party adversely affected by a determination may seek a hearing before the Independent Administrator. If no hearing is requested, the Election Officer's determination becomes final and binding. Pet. App. A107-A108. If a hearing is requested, the Independent Administrator conducts it and thereafter issues a written decision. That decision may be appealed to the district court. Pet. App. A108-A109.

Election Officer, contending that their exclusion from the Yellow Freight premises violated the Election Rules. Pet. App. A7, A38, A85-A92. The Election Officer investigated the protests and issued an opinion holding that petitioner cannot bar a candidate from campaigning on its property unless there is a reasonable alternative means of face-to-face communication. Pet. App. A63-A64. The Election Officer concluded that access to the Chicago Ridge facility parking lot was necessary to ensure reasonable access, but that alternative means of communication were adequate at the Detroit facility. Pet. App. A59-A60, A64-A68. Accordingly, the Election Officer ordered petitioner to provide access to the parking lot, or, in the alternative, an open area outside its terminal building at the Chicago Ridge facility. Pet. App. A66-A67.

Petitioner appealed the Election Officer's rulings to the Independent Administrator, arguing that neither the Election Officer nor the Independent Administrator had jurisdiction over it. Pet. App. A48. The Independent Administrator rejected the jurisdictional challenge and affirmed the Election Officer's order. Pet. App. A49-A60.

3. Petitioner then appealed the Independent Administrator's decision to the district court. The court rejected petitioner's argument that the Election Rules could not be enforced against a non-party. The court held that under the All Writs Act, 28 U.S.C. 1651, it had authority "necessary" in aid of its jurisdiction over the IBT RICO case and the ensuing consent decree, and that it was necessary to assert such authority where an employer's actions could subvert the election provisions that are the "crux" of the decree. Pet. App. A40-A42. Further, the court noted that non-employee IBT members have a limited "pre-existing" right of access to non-employer property as guaranteed by the National

Labor Relations Act (NLRA), 29 U.S.C. 158(a)(1). Pet. App. A42.

The district court also rejected petitioner's argument that the National Labor Relations Board (NLRB) has exclusive jurisdiction over such disputes. The court explained that the Supreme Court has recognized that certain federal labor claims that may be brought as unfair labor practice actions before the NLRB can also be asserted directly in federal court. The court held that this dispute did not fall within the NLRB's exclusive jur-isdiction because it was predicated upon the court-ordered Election Rules. Pet. App. A42-A43.

Finally, the court affirmed the decisions of the Independent Administrator and Election Officer on the merits.

4. Petitioner appealed the district court's ruling to the United States Court of Appeals for the Second Circuit. On October 29, 1991, the court of appeals issued an opinion and judgment, vacating the judgment of the district court and remanding the case for further proceedings. The court rejected petitioner's jurisdictional arguments, but held that the district court and the appointed officers did not adequately consider the alternate means available by which barred IBT campaigners might communicate with Yellow Freight employees. Judge Winter dissented on the ground that the district court lacked jurisdiction under either the All Writs Act or the consent decree to adjudicate this matter.

5. On December 31, 1991, the court of appeals denied petitioner's petition for rehearing and suggestion for rehearing in banc. Pet. App. A101-A102.

6. In January 1992, the 1991 IBT election was completed with the Election Officer's certification of the election results. Pet. App. A27.

7. On February 14, 1992, the court of appeals, *sua sponte*, issued an amended opinion.

a. The court of appeals in its amended opinion agreed that a consent decree does not ordinarily bind a non-party, but the court noted that there are exceptions to that general rule. Pet. App. A11-A12. The court explained, however, that in this case there was no need to resolve the question of whether the Consent Decree could be applied to Yellow Freight because the All Writs Act authorized the district court to issue an order requiring Yellow Freight to permit campaigning on its property. Pet. App. A12. The court pointed out that even petitioner had conceded that "the All Writs Act allows substantive injunctions against technical non-parties . . . [in at least some cases] to enforce a decree which adjudicates public rights." Pet. App. A13. The court of appeals held that the district court's protection of the IBT elections was in the public interest and that mandating limited access to employer premises for campaigning where there were no other feasible alternatives was properly deemed "necessary and appropriate" in aid of the district court's jurisdiction over the underlying RICO litigation. Pet. App. A13-A15.

b. The court further held that the procedures and review afforded to petitioner were adequate. The court stated that "[i]t is difficult to imagine additional or different procedures that would accord Yellow Freight a significantly enhanced opportunity to present its position concerning this controversy." Pet. App. A15-A17. Further, the court held that, as a matter of substantive law, the provision of access to Yellow Freight's Chicago Ridge facility was "agreeable to the usages and principles of law." Pet. App. A17.

c. The court rejected the argument that the NLRB had exclusive jurisdiction. The court explained that the NLRB's exclusive jurisdiction does not necessarily ex-

tend to matters where federal laws and policies other than the NLRA are implicated. The court accordingly held that this Election Rule dispute could properly be adjudicated under the Election Rules dispute mechanism. Pet. App. A18-A20. The court noted, however, that requiring "strict adherence to the requirements of federal labor law in the enforcement of the Consent Decree * * * will preclude * * * interference [with national labor policy]." Pet. App. A20.

d. On the merits, the court held that the district court, the Independent Administrator, and the Election Officer had failed to adequately examine the alternative means of communication available, and remanded the matter for further consideration. Pet. App. A20-A25. In a footnote, however, the court observed that between the time the original opinion was issued on October 29, 1991, and its amendment on February 14, 1992, this Court had decided *Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841 (1992), which significantly affected the law regarding access of nonemployees to an employer's property. Pet. App. A26-A27. The court of appeals stated that, because the case was now moot "in view of the completion of the 1991 election of IBT officers, we deem it unnecessary to amend [the discussion of the merits] * * *, but append this footnote simply to signal the *Lechmere* development of the law as of the amendment date of this opinion." Pet. App. A27 n.4.

e. Judge Winter again filed the same dissenting opinion that was filed with the October 29, 1991, opinion. Pet. App. A27-A35. Judge Winter noted that his dissent may now appear to be responding to arguments not raised by his colleagues. Pet. App. A34.

ARGUMENT

1. This case does not present a live case or controversy. The dispute here was whether petitioner violated

the 1991 Election Rules by barring union members who were not employed by petitioner from campaigning on its property. The Election Officer found that petitioner had violated the Election Rules with respect to its Chicago Ridge terminal and ordered petitioner to provide access to the parking lot, or, in the alternative, an open area outside its terminal building at that facility. Pet. App. A67. The district court originally affirmed that order, but the court of appeals vacated the district court's order and remanded the case. Pet. App. A26. The district court did not resolve the questions presented to it on remand and, since the elections have been held and the Election Rules no longer impose any obligation on petitioner, there is no need to resolve those issues now. Petitioner is not under any current obligation that could be affected by further review of the court of appeals' decision, and no party is arguing to the contrary. Therefore, any further proceedings would simply resolve an abstract question of law that is not embodied in a live "case or controversy" between the parties. See *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975); *Local No. 8-6, Oil Workers Int'l Union* v. *Missouri*, 361 U.S. 363 (1960).

Moreover, the petition does not present a question that is capable of repetition yet evading review. See *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1974). This case involves the effects of a unique consent decree aimed at ridding the IBT of the corrupt influence of organized crime. To accomplish that end, the parties and court agreed that the 1991 IBT election would be carried out in accordance with a particular set of procedures designed to eliminate organized crime influence over that election—the Election Rules. Now that the 1991 election is over, the Election Rules have no further effect. In short, a dispute involving the interpretation of the 1991

Election Rules or petitioner's obligation not to subvert those Rules is not "capable of repetition."[2]

Finally, even if the 1991 election had not been completed and this dispute were not moot, the court of appeals did not affirm the district court's decision, but instead vacated it and remanded the case so that the district court could make further factual determinations concerning petitioner's obligations to permit non-employees to campaign on its property. Thus, even if this case were not moot, it would come before this Court in an interlocutory posture, in which further factual findings necessary to frame the ultimate issues on the merits have not yet been made and in which neither court below has had the opportunity to address this Court's decision in *Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841 (1992). Further review accordingly would not be war-ranted even if the case were not moot.

2. In any event, the court of appeals was correct in holding that the district court appropriately invoked its powers under the All Writs Act against an employer whose conduct could have subverted the court-ordered Election Rules and consent decree.[3] Contrary to peti-

[2] In addition, the court of appeals' decision concerning whether an employer may be required to permit non-employees to campaign for union office on its premises is likely to have little future effect even as precedent. The court itself believed that because the dispute was moot there was no need to address the effect of this Court's *Lechmere* decision on the merits of petitioner's claim that it was not required to permit non-employees to use its property to campaign for union office. See Pet. App. A26-A27. The opinion's discussion of the merits of this case will thus have little, if any, future precedential force.

[3] Petitioner contends that the court of appeals erred in holding that petitioner was bound by a consent decree to which it was not a party. Pet. 8-15. The court of appeals, however, expressly stated that it was *not* deciding whether petitioner could be bound by the Consent Decree. Pet. App. A12-A13. Instead, the issue deter-

tioner's suggestion (Pet. 21-22), the district court did not employ the Act to enforce a private agreement between the United States and the IBT. Rather, the district court invoked the Act to protect the fair and free elections that were central to achieving the goal of this RICO action: ridding the union of the influence of organized crime. Pet. App. A40-A42.

Petitioner complains that the court should not have adopted "rules for employers in their absence." Pet. 17. The district court did not, however, impose any new substantive obligations on petitioner. The court's order was designed simply to ensure that petitioner would not breach its pre-existing obligations under the NLRA and thereby subvert the election process. Pet. App. A17, A20, A42. Thus, in accord with the All Writs Act, the substantive law applied was plainly "agreeable to the usages and principles of law." Pet. App. A16. Further, petitioner cannot argue that the enforcement of the All Writs Act imposed any procedural hardship. As the court of appeals stated, "[i]t is difficult to imagine additional or different procedures that would accord Yellow Freight a significantly enhanced opportunity to present its position concerning this controversy." Pet. App. A15-A17.

Petitioner contends that the All Writs Act did not provide authority for the district court's original order in this case because the NLRB has exclusive jurisdiction over this dispute.[4] Pet. 22-29. The NLRB does not, however, have exclusive jurisdiction over matters pertaining to or necessary for the enforcement of this RICO

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mined by the court of appeals was whether the district court properly exercised its authority under the All Writs Act. Pet. App. A12-A17.

[4] This Court has recently denied certiorari in a case similarly challenging the district court's jurisdiction under the All Writs Act to enforce the Teamsters consent decree. *Star Market Co.* v. *United States*, No. 91-1674 (June 22, 1992).

consent decree or the court-ordered Election Rules. Pet. App. A18-A20. The principal case relied upon by petitioners, *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), is not to the contrary. Pet. 23-24. *Garmon* holds that state regulations must ordinarily yield to the NLRB's primary jurisdiction over unfair labor practice disputes. *Garmon* does not address the enforcement of independent federal rights that flow from the consent decree or the scope of a district court's power to enforce that decree under the All Writs Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

WILLIAM KANTER
ROBERT M. LOEB
Attorneys

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